

Criminal Code (Prohibited Symbols) Regulation 2024

Human Rights Certificate

Prepared in accordance with Part 3 of the Human Rights Act 2019

In accordance with section 41 of the *Human Rights Act 2019* (HR Act), I, Yvette D'Ath MP, Attorney-General and Minister for Justice and Minister for the Prevention of Domestic and Family Violence, provide this human rights certificate with respect to the *Criminal Code (Prohibited Symbols) Regulation 2024* (the Regulation) made under the Criminal Code.

In my opinion, the Regulation, as tabled in the Legislative Assembly, is compatible with the human rights protected by the HR Act. I base my opinion on the reasons outlined in this statement.

Overview of the Subordinate Legislation

On 12 October 2023, the *Criminal Code (Serious Vilification and Hate Crimes) and Other Legislation Amendment Act 2023* (Amendment Act) was passed by the Legislative Assembly. The Amendment Act was given assent on 19 October 2023.

On 8 December 2023, the uncommenced provisions of the Amendment Act were proclaimed fixing 29 April 2024 as the day for commencement of all remaining provisions of the Amendment Act.

Upon commencement of the remaining provisions of the Amendment Act on 29 April 2024, section 52C (Prohibited symbols) and section 52D (Display, distribution or publication of prohibited symbols) will be inserted into the Criminal Code.

New section 52C of the Criminal Code will enable a regulation to be made to prescribe a symbol or image as a prohibited symbol for the purposes of the offence in new section 52D of the Criminal Code.

New section 52C(3) of the Criminal Code will provide that the Minister responsible for the administration of the Criminal Code, may, after consultation with the chairperson of the Crime and Corruption Commission, Human Rights Commissioner, and the Police Commissioner, recommend that the Governor in Council make a regulation prescribing a prohibited symbol. The Minister can do this only if satisfied that the symbol or image is widely known by the public, or by members of a 'relevant group', as being solely or substantially representative of an ideology of extreme prejudice against a relevant group.

Relevant group is defined to mean a group of persons who identify with each other on the basis of an attribute or characteristic that is, or is based on, the race, religion, sexuality, sex characteristics or gender identity of the persons.

New section 52D of the Criminal Code will prohibit the public display, public distribution or publication of a prohibited symbol (as prescribed under section 52C), in a way that might reasonably be expected to cause a member of the public to feel menaced, harassed or offended, unless the person has a reasonable excuse. The maximum penalty for the offence will be 70 penalty units or six months imprisonment.

For the purposes of the provision, a person will not commit the offence if they engaged in conduct for a genuine artistic, religious, educational, historical, legal, law enforcement or public interest purpose, or to oppose the ideology represented by the prohibited symbol and the display of the symbol was 'reasonable' for that purpose.

The Regulation will prescribe the Nazi Hakenkreuz as a prohibited symbol under section 52C of the Criminal Code (as inserted by section 12 of the Amendment Act). The Amendment Act, and the Regulation, recognises the importance of protecting minority groups from distress associated with the public display of symbols that are solely or substantially representative of an ideology of extreme prejudice against particular groups.

Human Rights Issues

Human rights relevant to the subordinate legislation (Part 2, Division 2 and 3 *Human Rights Act 2019*)

I have considered each of the rights protected by part 2 of the HR Act. In my opinion, the human rights relevant to the Regulation are:

- right to recognition and equality before the law (section 15);
- right to freedom of thought, conscience, religion and belief (section 20);
- right to freedom of expression (section 21(2));
- right to peaceful assembly and freedom of association (section 22);
- right to take part in public life (section 23);
- right to own property alone or in association with others (section 24(1));
- right to privacy (section 25(1)); and
- cultural rights (section 27).

Consideration of reasonable limitations on human rights (section 13 *Human Rights Act 2019*)

(a) the nature of the right

Right to recognition and equality before the law

The rights to recognition and equality before the law in section 15 of the HR Act encompass the right to recognition as a person before the law and the right to enjoy the person's human rights without discrimination. Sections 15(3) and (4), drawn from Articles 16 and 26 of the International Covenant on Civil and Political Rights (ICCPR), provide a right to equal and effective protection against discrimination and entitles every person to a separate and positive right to be effectively protected against discrimination.¹

¹ Human Rights Committee, *CCPR General Comment No. 18: Non-discrimination*, 37th sess (10 November 1989), [2], [10]. See also William Schabas, *UN International Covenant on Civil and Political Rights: Nowak's*

Under the HR Act, ‘discrimination’ includes discrimination as defined in the *Anti-Discrimination Act 1991* (Qld) (AD Act), which protects attributes including religious or political belief or activity and race, but may also include protection of additional characteristics recognised in other jurisdictions such as language.²

By specifying the Nazi Hakenkreuz as a prohibited symbol for the purposes of new section 52D of the Criminal Code, the Regulation will limit the right to equality before the law under section 15(4) HR Act by treating people who publicly display either the Nazi Hakenkreuz symbol, or symbols that so nearly resemble the Nazi Hakenkreuz that they are likely to be confused with or mistaken for the Nazi Hakenkreuz, unfavourably in comparison to people who do not engage in that activity.

The unfavourable treatment arises out of both the prohibition generally, and the fact that new section 52D(3) of the Criminal Code places an evidential burden upon the defendant to show a reasonable excuse for displaying the relevant symbol. The display of the Nazi Hakenkreuz, or of symbols that could be mistaken for the Nazi Hakenkreuz, could be characterised as a form of political or religious activity, attributes which are protected by the AD Act.

For example, symbols that could be mistaken for the Nazi Hakenkreuz include the swastika, manji or wān character, which are often used for religious and cultural purposes by people of Buddhist, Hindu or Jain faiths or from South or East Asian cultural backgrounds.³ It is not Parliament’s intent that the Regulation result in the criminalisation of the use of these or similar symbols for religious or cultural purposes. This is evident in the inclusion of a ‘reasonable excuse’ defence in section 52 which includes use of prohibited symbols for genuine artistic, religious, educational, historical, legal or law enforcement purposes. However, it is possible that confusion in the community could result in these groups being placed in the position of having to distinguish these symbols from the Nazi Hakenkreuz and/or show they have a reasonable excuse under section 52D, in circumstances where people of other faiths and cultural backgrounds would not have to justify use of their religious and cultural symbols.

Right to freedom of thought, conscience, religion and belief

Section 20(1)(b) of the HR Act protects the right to demonstrate a religion individually or as part of a group, in public or in private. The right recognises that persons are entitled to have differing beliefs in a pluralistic society. As with the limitation on the right to recognition and equality before the law, the prescription of the Nazi Hakenkreuz as a prohibited symbol will limit the freedom of Buddhists, Hindus and Jains to demonstrate their religion or belief in public because it creates a risk that they would have to justify use of their religious symbols where people of other faiths would not.

CCPR Commentary (3rd ed, 2019) 749 [21]. See also *Lifestyle Communities Ltd* [No 3] (2009) 31 VAR 286, 344 [287]-[288] (Bell J); *Matsoukatidou v Yarra Ranges Council* (2017) 51 VR 624, 641 [53], 657 [105] (Bell J).

² *International Convention on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976), art 26.

³ Deepa Bharath, ‘Asian faiths try to save swastika symbol corrupted by Hitler,’ *AP Global* (online, 28 November 2022) available at: <https://apnews.com/article/religion-germany-race-and-ethnicity-europe-2c28b5892381cd4148dfde5bc4fbb004>; Sumeet Kaur, ‘Don’t confuse Nazi symbol with sacred swastika’: Australian Hindus call for education amid ban,’ *SBS Punjabi* (online, 5 October 2022) available at: <https://www.sbs.com.au/language/punjabi/en/podcast-episode/dont-confuse-nazi-symbol-with-sacred-swastika-australian-hindus-call-for-education-amid-ban/8zlp7za57>.

Right to freedom of expression

The right to freedom of expression in section 21(2) of the HR Act protects the right of all persons to seek, receive and impart information and ideas (including verbal and non-verbal communication). People may choose to communicate ideas by visual forms of protest, symbols and clothing. The right to freedom of expression and the free flow of information and ideas, particularly about public and political issues, is considered to be a touchstone of a democratic society. It has a wide scope, protecting almost all forms of expression, written and verbal, or through art or conduct,⁴ and protecting the expression of ideas that may be offensive, shocking or disturbing.⁵ The right also includes the right *not* to express ideas or opinions,⁶ and so is engaged whenever a person may be compelled to provide information or answer questions.

However, limits on freedom of expression may be justified when the expression is ‘unquestionably antithetical to freedom, democracy and the rule of law that sustain our society,’⁷ or when the restriction is required ‘for the respect of rights and reputations of others.’⁸

By specifying the Nazi Hakenkreuz as a prohibited symbol for the purposes of new section 52D of the Criminal Code, the Regulation will limit the right to freedom of expression under section 21(2) of the HR Act by:

- restricting an individual’s right to communicate ideas in a way that might reasonably be expected to cause a member of the public to feel menaced, harassed or offended using the Nazi Hakenkreuz or symbols that so closely resemble the Nazi Hakenkreuz as to be likely to be confused with, or mistaken for, it;
- restricting the rights of individuals to receive public communications that use the Nazi Hakenkreuz or a symbol mistaken for it in a way that might reasonably be expected to cause a member of the public to feel menaced, harassed or offended; and
- resulting in a person who is accused of using a Nazi Hakenkreuz, or another symbol mistaken for the Nazi Hakenkreuz, to commit an offence under section 52D – including, potentially, people using the relevant symbol to convey anti-Nazi ideas, or unrelated religious or cultural ideas – to discharge an evidential burden with respect to the reasonableness of their actions.

Right to peaceful assembly and freedom of association

The right to peaceful assembly (section 22(1) HR Act) and freedom of association (section 22(2)) upholds the rights of individuals to gather together in order to exchange, give or receive information, to express views or to conduct a protest or demonstration. The right entitles persons to gather intentionally and temporarily for a specific purpose and is considered essential for the public expression of a person’s views and opinions.⁹ The protection of the

⁴ *Magee v Delaney* (2012) 39 VR 50; [2012] VSC 407, [61].

⁵ *Handyside v United Kingdom* (1976) 1 EHRR 737; (1976) Eur Court HR 5, [49].

⁶ *Slaight Communications Inc v Davidson* [1989] 1 SCR 1038, 1080.

⁷ *Magee v Delaney* (2012) 39 VR 50; [2012] VSC 407, [89].

⁸ *International Convention on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976), art 19(3)(a); Human Rights Committee, *General Comment No 34: Freedoms of opinion and expression (Article 19 of the International Covenant on Civil and Political Rights)*, 102nd sess, UN Doc CCPR/C/GC/34 (12 September 2011), [9], [11].

⁹ Human Rights Committee, *General comment No. 37 (2020) on the right of peaceful assembly (article 21)*, 129th session, UN Doc CCPR/C/GC/37 (17 September 2020), [12].

right is limited to peaceful assemblies (and does not protect violent assemblies such as riots).¹⁰ Symbols and/or images are often used to attract like-minded people who form associations and assemble in meetings and other events.

Specifying the Nazi Hakenkreuz as a prohibited symbol will limit the rights to peaceful assembly and freedom of association under section 22 of the HR Act by inhibiting and disincentivising people from making these connections using the Nazi Hakenkreuz, or any symbol that could reasonably be mistaken for the Nazi Hakenkreuz.

Right to take part in public life

The right to take part in public life in section 23 of the HR Act affirms the right of all persons to contribute to and exercise their voices in relation to the public life of the State. It ensures all persons have the opportunity to contribute to the political process and public governance, directly or through freely chosen representatives.¹¹ Similarly, the new offence at section 52D of the Criminal Code will limit the right to take part in public life under section 23 of the HR Act by limiting a citizen's right to participate in the conduct of public affairs by exerting influence through public debate and dialogue. An impact on the ability to communicate political information and ideas will limit this right.

Property rights

Section 24 of the HR Act protects individuals' right to own property alone or in association with others, and the right not to be arbitrarily deprived of their property. An 'arbitrary' interference is one that is 'capricious, unpredictable, or unjust' or 'unreasonable in the sense of not being proportionate to a legitimate aim sought.'¹² If an interference with the right to property results in a deprivation of property that is not 'arbitrary' within this meaning, the proper interpretation is that there has been no limit to the right.

Property rights are engaged by the Regulation because the Vilification Act, in addition to creating the offence under section 52D Criminal Code, also amends the *Police Powers and Responsibilities Act 2000* to empower police to conduct searches of people and vehicles without a warrant where they reasonably suspect that an offence against section 52D is being or has been committed.¹³ As a result of the search, a police officer may seize an item that may provide evidence of the commission of an offence.

Specifying the Nazi Hakenkreuz as a prohibited symbol will interfere with property rights by enabling seizure of items that include the Nazi Hakenkreuz or any symbol that could reasonably be mistaken for the Nazi Hakenkreuz where an officer has a relevant reasonable suspicion. However, this interference is not considered to be arbitrary, and, therefore, property rights are not limited.

¹⁰ Human Rights Committee, *General comment No. 37 (2020) on the right of peaceful assembly (article 21)*, 129th session, UN Doc CCPR/C/GC/37 (17 September 2020), [15].

¹¹ William A Schabas, U.N. International Covenant on Civil and Political Rights: Nowak's CCPR Commentary (N. P. Engel, Publisher, 3rd rev ed, 2019) 699.

¹² *PJB v Melbourne Health* [2011] VSC 327, [85].

¹³ *Criminal Code (Serious Vilification and Hate Crimes) and Other Legislation Amendment Act 2023* (Qld) ss 25-26.

Right to privacy and reputation

Section 25(1) of the HR Act protects a person's right not to have their privacy, family, home or correspondence unlawfully or arbitrarily interfered with. The scope of the right to privacy is very broad, and encompasses not just informational privacy, but also a person's sense of mental or physical integrity.¹⁴ At its most basic, the right is concerned with notions of personal autonomy and dignity, including a person's sense of personal and social individuality and identity. The concept of lawfulness in the context of the right to privacy means that no interference can take place except in cases envisaged by the law. An 'arbitrary' interference is one that is 'capricious, unpredictable, or unjust' or 'unreasonable in the sense of not being proportionate to a legitimate aim sought.'¹⁵ If an interference with the right to privacy is not 'arbitrary' within this meaning, the proper interpretation is that there has been no limit to the right.

By specifying the Nazi Hakenkreuz as a prohibited symbol, the Regulation will interfere with the right to privacy by enabling police to conduct searches of people and vehicles without warrants for property bearing that symbol, or any symbol that could reasonably be mistaken for the Nazi Hakenkreuz, where an officer has a relevant reasonable suspicion about an offence under section 52D of the Criminal Code. Further, the Regulation will interfere with the right to privacy by inhibiting the ability of people to identify with the ideas behind the Nazi Hakenkreuz, or behind symbols that could be mistaken for the Nazi Hakenkreuz. However, these interferences are not considered arbitrary, and therefore, the right to privacy is not limited.

Cultural rights

Section 27 of the HR Act preserves the right of all people, whether alone or in community with others of similar cultural, religious, racial or linguistic backgrounds, to enjoy their culture, to declare and practice their religion and to use their language. These rights are directed towards ensuring the survival and continued development of the cultural, religious and social identity of minorities. Section 15(2) of the HR Act provides that every person has the right to enjoy their human rights without discrimination.

As discussed above, the specification of the Nazi Hakenkreuz as a prohibited symbol carries a risk that confusion within the community could result in some members of particular cultural or religious groups being required, by virtue of section 52D(3), to justify the use of their cultural or religious symbols, or linguistic characters, where other cultural groups would not be so required. This risk represents a limit to cultural rights under section 27 of the HR Act insofar as it may impact upon or deter the ability of people of a particular cultural background to control their cultural heritage and practise their religion.

(b) The nature of the purpose of the limitation to be imposed by the legislation if enacted, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom

The purpose of the Regulation is to address the specific harm that arises in the Queensland community through the use of the Nazi Hakenkreuz; to disrupt the proliferation of harmful

¹⁴ *BZN v Chief Executive, the Department of Children, Youth Justice and Multicultural Affairs* [2023] QSC 266, [231];

¹⁵ *PJB v Melbourne Health* [2011] VSC 327, [85].

extremist ideologies that are antithetical to the principles of equality and non-discrimination associated with the use of the Nazi Hakenkreuz, and that may lead to other forms of criminal offending; and, ultimately, in doing each of these things, to promote social cohesion and the equal dignity, safety and security of all individuals. This is self-evidently consistent with a free and democratic society based on human dignity, equality and freedom.

(c) The relationship between the limitation to be imposed by the legislation if enacted, and its purpose, including whether the limitation helps to achieve the purpose

The public display of symbols that are solely or substantially representative of an ideology of extreme prejudice against particular groups causes significant harm as such symbols represent hate, genocide, and trauma, regardless of the motivation for the display of the symbol.

In the context of the Nazi Hakenkreuz, the LASC Report noted the submission from the Queensland Jewish Board of Deputies that public display of such hate symbols:

impacts the sense of safety and security of all Queenslanders, including those who are members of groups and communities that have historically been the targets of Nazi policies of genocide, mass murder and other forms of persecution, such as Jews, Roma people, the disabled and LGBTIQ people.

The LASC Report noted that during the period of its inquiry, a flag depicting the Nazi Hakenkreuz was flown over a synagogue in Brisbane and, although there were limitations to the data collected by the Queensland Police Service (QPS) on hate crimes, the QPS concluded that the data shows an increase in hate crime.

While the Nazi Hakenkreuz is not the only symbol identified by the LASC for potential prohibition, its specification in the present regulation does not prevent future specification of other symbols as may be appropriate from time to time.

(d) Whether there are any less restrictive and reasonably available ways to achieve the purpose of the legislation

Several options for achieving the purpose stated in (b) above have been considered. One alternative way to achieve the purpose would be to not prescribe the Nazi Hakenkreuz as a prohibited symbol under the Criminal Code, but instead attempt to minimise the harm by solely relying on community education campaigns. However, community education alone is unlikely to be as effective at achieving the purpose.

Another alternative could be to prescribe the Nazi Hakenkreuz as a prohibited symbol in the Regulation, but in addition, specify symbols in the Regulation such as the swastika, manji or wàn character as not being prohibited symbols, but this may also reduce the effectiveness of the prohibition because it is possible that a person may use a crude representation of a Nazi Hakenkreuz in a manner intended to be captured by the offence under section 52D, but which more closely resembles or appropriates the non-prohibited symbol.

Other safeguards have been adopted to ensure that the Regulation goes no further than is necessary to achieve its purpose. These safeguards including complying with the requirements in new section 52C(3) and (4) of the Criminal Code, namely that:

- (a) the Nazi Hakenkreuz is widely known by the public as being solely or substantially representative of an ideology of extreme prejudice against a relevant group or groups, with the relevant groups including Jewish people, Roma people, disabled people and LGBTQIA+ people;
- (b) the Nazi Hakenkreuz is widely known by members of the above groups as being solely or substantially representative of an ideology of extreme prejudice against those groups; and
- (c) consultation has occurred with the chairperson of Crime and Corruption Commission, Human Rights Commissioner and the Police Commissioner.

Similarly, the offence in section 52D of the Criminal Code is restricted to use of prohibited symbols that might reasonably be expected to cause a member of the public to feel menaced, harassed or offended, and no offence is committed where a person has a reasonable excuse, such as where a relevant symbol is used for a genuine artistic, religious, educational, historical, legal, law enforcement or public interest purpose, or to oppose the ideology represented by the prohibited symbol and the display of the symbol was 'reasonable' for that purpose.

While it is acknowledged that potential for confusion in the community could lead to misidentification of people who use the symbol with a reasonable excuse as having committed the offence, it is also noted that the likelihood of non-prohibited symbols such as the sacred swastika, manji or wàn character, being used in a way that leads to menace, harassment or offence is low.

Accordingly, the prescription of the Nazi Hakenkreuz as a prohibited symbol is the only reasonably available way of achieving the purpose of the limitation and is a measure that goes no further than is necessary to achieve the purpose of the limit.

- (e) The balance between the importance of the purpose of the legislation, which, if enacted, would impose a limitation on human rights and the importance of preserving the human rights, taking into account the nature and extent of the limitation

On the one hand, the limits identified under heading (a) above will affect the human rights both of people who hold pro-Nazi, pro-fascist or extremist ideologies, as well as the human rights of people who do not hold such views, but whose cultural and religious symbols were distorted and misappropriated by Nazi ideology. For the latter group, the identified limits on human rights are deeply felt, and regrettably may inadvertently impact the demonstration of their religion or culture.

In recognition of this, the offence in section 52D has been drafted as narrowly as possible, with appropriate safeguards in the application of the defence. In this way, the features of the authorising legislation ensure that the limits on human rights felt by individuals who use a relevant symbol with a reasonable excuse are lesser than the limits to the rights of those individuals who engage in conduct that the law seeks to condemn and disrupt. The Regulation has consequently been developed with these safeguards in mind, and in compliance with the limits on the regulation-making power set out in section 52C of the Criminal Code.

On the other hand, the Nazi Hakenkreuz has historically been, and continues to be, a symbol of hatred and prejudice, and of an ideology fundamentally antithetical to Queensland's

multicultural, multiethnic and democratic society. Its prohibition is a vital step in disrupting the proliferation of harmful extremist ideologies linked to Nazism, particularly where such ideologies can be linked to patterns of hate-motivated criminal offending, and protecting members of the Queensland community from the uniquely distressing and traumatising effects that result from its improper use.

The Regulation will enable the protection of minority groups from distress associated with the public display of a symbol that is solely or substantially representative of an ideology of extreme prejudice against particular groups. These steps are necessary to protect social cohesion within the Queensland community, which is a crucial element of a modern democracy.

Having regard to the importance of achieving the purpose, the nature of the limits to human rights and the protective factors outlined above to ensure that the limits are proportionate, the prohibition of the Nazi Hakenkreuz strikes a fair balance between preserving the relevant human rights and the purpose of the legislation.

(f) Any other relevant factors

Nil.

Conclusion

In my opinion, the subordinate legislation is compatible with human rights under the HR Act because it limits human rights only to the extent that is reasonable and demonstrably justifiable in a free and democratic society based on human dignity, equality and freedom.

YVETTE D'ATH MP
Attorney-General and Minister for Justice and
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